In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 448.

IN THE MATTER OF
VAN SWERINGEN CORPORATION,
Debtor,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

THE CLEVELAND HOTEL PROTECTIVE COMMITTEE,
J. C. LINCOLN, GORDON MACKLIN, ROBERT H. JAMISON,
MELVIN B. HOTT AND ROY BRENHOLTS,
Individually and as Members of said Committee,
and
THE HENRY GEORGE SCHOOL OF SOCIAL SCIENCE,
Intervening Petitioners,
Petitioners,

VS.

THE NATIONAL CITY BANK OF CLEVELAND,
Successor Trustee,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Respondents.

IN PROCEEDINGS FOR THE REORGANIZATION
OF A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

REJOINDER BRIEF OF THE CLEVELAND TERMINALS BUILDING COMPANY, RESPONDENT.

(Names of Counsel on inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

I. W. SHARP,
and
J. HALL KELLOGG,
Bulkley Bldg., Cleveland, Ohio,
Attorneys for the Respondent,
The Cleveland Terminals Building
Company.

INDEX.

Cases Cited.

In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 448.

IN THE MATTER OF
VAN SWERINGEN CORPORATION,
Debtor,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

THE CLEVELAND HOTEL PROTECTIVE COMMITTEE,
J. C. LINCOLN, GORDON MACKLIN, ROBERT H. JAMISON,
MELVIN B. HOTT AND ROY BRENHOLTS,
Individually and as Members of said Committee,
and
THE HENRY GEORGE SCHOOL OF SOCIAL SCIENCE,
Intervening Petitioners,
Petitioners,
vs.
THE NATIONAL CITY BANK OF CLEVELAND,
Successor Trustee,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Respondents.

IN PROCEEDINGS FOR THE REORGANIZATION
OF A CORPORATION.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

REJOINDER BRIEF OF THE CLEVELAND TERMINALS BUILDING COMPANY, RESPONDENT.

INTRODUCTION.

The reply brief filed by petitioners is in reality a second main brief—not a rebuttal. This makes it permissible and appropriate to file a short rejoinder thereto.

I.

FAIRNESS AND EQUITY.

Petitioners question why Subsidiary Debtor should have 100% of the stock of the proposed new lessee corporation, when (as petitioners say) it contributes only 22% of the capital. The answer is short and simple.

The factor which makes the Plan fair and equitable in spite of that allocation of stock is the manifest advantage and desirability of the lease, in its modified form, from the landlord's point of view. That an advantageous lease can be an asset to a landlord is elementary. That it may in a particular case be advantageous enough to justify a landlord's paying something to get it (by contribution to the lessee or otherwise) should occasion no surprise.

The details of the advantages to the landlord in the revised Cleveland Hotel lease are set forth in our main brief at pages 17 to 23—the opportunity for increased rent, the ready market for those who wish to sell their land trust certificates immediately, the assurance of eventual recovery of all of the original investment for those who await the call of their certificates, the improved chattel mortgage, the hypothecation of the stock of the proposed new lessee corporation, and the lessee's foregoing all compensation until the landlord's security is made absolutely sound by the purchase of at least one-half of the outstanding interests.

These advantages are a fair and equitable compensation in money's worth for the surrender of the security on

the back rent claim and the acceptance for that claim of stock of the Subsidiary Debtor, and a small cash payment. The Trustee thought so, three-fourths in interest of the certificate holders thought so, the Special Master thought so, the District Judge thought so, and the three Judges of the Circuit Court of Appeals thought so. Moreover, this conclusion has been made a specific part of the finding and judgment of the Court. See the Order of Confirmation of the Hotel Plan, wherein the Trial Court specifically found

"(n) that the Cleveland Hotel Plan is fair and equitable" (R. 89).

II.

THE LANDLORD'S OPTION.

Under the heading of "Failure to Accept," the Plan provides:

> "In case the holder or holders of any such secured claim shall also sustain the relation of landlord to The Cleveland Terminals Building Company, then The Cleveland Terminals Building Company may, under appropriate orders of the Court, reject the lease involved in such relation * * *."[1]

Thus the landlord here had an option: Either it could accept the Plan proposed to it, or in the alternative it might expect to have its strict legal rights upon rejection. It could either

(a) Accept the Plan, or

(b) Take over the Hotel Building, with its furniture, fixtures, and equipment, and proceed to deal with them as best it could.

---

[1] See Article VIII, Section VIII, subsection 5, page 46 of the General Plan of Reorganization of The Cleveland Terminals Building Company (an unnumbered physical Exhibit).

Thus the Plan constituted an offer which the landlord was free to accept or reject, as it saw fit.

This is exactly the alternative which faced the Terre Haute interests in the *Milwaukee* case,[2] and the Boston Terminal interests in the *New Haven* case.[3] In the former case the Court said at page 546:

> "The Terre Haute bondholders were in effect given the option to take the Terre Haute lines back or agree to a reduced rental."

In the latter case the Court said at page 52:

> "The provisions were * * * an offer of a revised arrangement which the Terminal Company is free to accept or reject * * *."

In each case the acceptance of the Plan was sustained.

The situation in the instant case is the same. The Trustee was in effect given the option to take the hotel back or to agree to a modification of the lease and a waiver of its strict legal rights with reference to the property covered by the chattel mortgage.

In practical effect, the Trustee is in the same position as though it had

(a) declared a forfeiture of the lease and a forfeiture of the chattel mortgage;

(b) taken possession of the hotel building, and the furniture, fixtures, and equipment;

(c) set out, thus entrenched, to find a new lessee;

(d) found a prospective tenant with satisfactory managerial ability which would take a percentage

---

[2] *Group of Institutional Investors, et al. vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company* (1943), 318 U. S. 523.

[3] *New York, New Haven & Hartford Railroad Co., In re,* (C. C. A. Conn. 1945), 147 F. (2d) 40 (Certiorari denied in 325 U. S. 884; rehearing denied, 325 U. S. [No. 2] XVIII).

lease upon rental terms which the Trustee regarded as highly desirable, but would take it only upon condition that the Trustee contribute the furniture, fixtures, and equipment to the lessee and accept a new chattel mortgage thereon; and

(e) decided to accept said condition for the sake of obtaining a lease it regarded as more desirable than any lease which did not involve such a contribution on the landlord's part.

Thus the Trustee has had the equivalent of a recapture of all of the property and the making of the most advantageous lease possible thereon. As in the case of the Terre Haute bondholders, the landlord had in effect the option to take all the property back or to agree to modifications. Under the authority of the *Milwaukee* case the acceptance of the modifications which the Plan provided for, and which the District Court approved, is therefore valid.

III.

THE DELEGATION OF CONTROL.

Under the terms of what might be called their charter papers, the certificate holders delegated to the Trustee the absolute control[4] of the lease, and reserved to themselves the power to amend the Declaration of Trust by a vote of

---

[4] Article IX of the Declaration of Trust provides that:

"The Trustee may advise with legal counsel, and any action under this Trust Agreement taken or suffered in good faith by the Trustee in accordance with the opinion of such counsel shall be *conclusive on the Beneficiaries*, and the Trustee shall be fully protected in respect thereof. * * *

"The Trustee shall have the *exclusive right to control* the Trust Estate as it may deem for the best interests of the Beneficiaries, *free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof*, and shall not be subject to any

(Continued on following page)

three-fourths in interest.[5] In the absence of fraud, which has been specifically negatived by the order and judgment of the Court in this case (R. 87), these provisions are absolutely binding on the petitioners and every other certificate holder. No reason to the contrary has been shown, or even attempted to be shown. The certificate holders are in the same position as stockholders of a corporate creditor in a reorganization proceeding of its debtor—their duly constituted representative speaks for them, and they have no right to intervene, to be heard, or to appeal.

Their duly constituted representative, in the honest exercise of the discretion conferred upon it, and after advising with legal counsel, has taken action in good faith in accordance with the opinion of such counsel (See Article

---

(Continued from preceding page)

obligations to the Beneficiaries other than such as are expressly assumed hereunder." (Emphasis ours.)

Article V provides that:

"* * * the Trustee shall have full authority * * * in such case (termination of lease) or *in any other contingency* to take such other action with respect to the Lease or Trust Estate as it shall deem advisable, without reference to the Beneficiaries and as if it were the sole legal and equitable owner thereof, and *no person dealing with the Trustee shall be bound to inquire concerning the authority of the Trustee so to act.*" (Emphasis ours.)

Finally, there is a provision which is no doubt expressive of the rule which would prevail anyhow, to-wit (Article XIII) that:

"By the acceptance of any Certificate issued hereunder, the original or any successive holder shall be deemed to assent to all of the provisions contained in this Trust Agreement."

[5] Article XIV of the Declaration of Trust provides that:

"This Declaration may be amended by written instrument executed and acknowledged by the Trustee and consented to in writing by three-fourths in interest of the Beneficiaries." R. 122, 639.)

IX, page 5, *supra*); and such action is therefore, "conclusive on the Beneficiaries," as Article IX has it.

The Trustee and more than three-fourths in interest of the certificate holders found that, rather than to have the lease rejected and the hotel back on the Trustee's hands, it would be better to accept the Plan, and to obtain the increased rental opportunity afforded thereby and the other advantages of the Plan, even at the expense of subsidizing the proposed new lessee by removing the back rent from the obligations secured by the chattel mortgage.

The dissenters now claim the right to substitute their judgment for that of the Trustee and three-fourths in interest of the certificate holders. This, in the established absence of fraud, derogated from their express contract, and cannot be permitted.

CONCLUSION.

The Plan is fair and equitable; the judgment of the Trustee and three-fourths in interest of the certificate holders in preferring Acceptance of the Plan to rejection of the lease was justified; and the minority, having covenanted to abide by the judgment of the Trustee and three-fourths in interest of the beneficiaries, and there being no fraud involved, have no right to intervene, to be heard, or to appeal.

Respectfully submitted,

I. W. SHARP, and
J. HALL KELLOGG,

Attorneys for The Cleveland Terminals Building Company, Respondent.